

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GUSTAVO RAMIREZ,
CDCR #K-93380,

Plaintiff,

vs.
GEORGE GIURBINO; LARRY SMALLS;
E. SILVA; M. TAMAYO; E. DUARTE;
JOHN ZINNA; JAMES MORENO,

Defendants.

Civil No. 10cv1292 WQH (AJB)

ORDER:

(1) DISMISSING DEFENDANT J. OCHOA; and
(2) DIRECTING U.S. MARSHAL TO EFFECT SERVICE OF AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P. 4(c)(3) & 28 U.S.C. § 1915(d)

I.

PROCEDURAL HISTORY

On June 14, 2010, Plaintiff, Gustavo Ramirez, a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California and proceeding pro se, filed a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff also filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). On July 7, 2010, the Court granted Plaintiff’s Motion to Proceed IFP and sua sponte dismissed his Complaint for failing to state a claim. *See* July 7, 2010 Order at 6-7. On July 19, 2010, Plaintiff filed his First Amended Complaint (“FAC”).

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II.

SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) AND § 1915A

3 As the Court stated in its previous Order, the Prison Litigation Reform Act (“PLRA”)
4 obligates the Court to review complaints filed by all persons proceeding IFP and by those, like
5 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or
6 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
7 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”
8 *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte
9 dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails
10 to state a claim, or which seeks damages from defendants who are immune. *See* 28 U.S.C. §
11 1915(e)(2)(B) and § 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
12 (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

13 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
14 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
15 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
16 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
17 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of
18 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection
19 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
20 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
21 (discussing 28 U.S.C. § 1915A).

22 “[W]hen determining whether a complaint states a claim, a court must accept as true all
23 allegations of material fact and must construe those facts in the light most favorable to the
24 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
25 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
26 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
27 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
28 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

1 The Court finds that Plaintiff's claims are now sufficiently pleaded to survive the sua
2 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff is
3 entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C.
4 § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in
5 [IFP] cases."); FED.R.CIV.P. 4(c)(3) ("[T]he court may order that service be made by a United
6 States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis*
7 under 28 U.S.C. § 1915."). Plaintiff is cautioned, however, that "the sua sponte screening and
8 dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6)
9 motion that [a defendant] may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119
(S.D. Cal. 2007).

III.

CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

14 1. Defendant J. Ochoa is **DISMISSED** from this action. *See King v. Atiyeh* (814
15 F.2d 565, 567 (9th Cir. 1987) (Defendants not named and all claims not re-alleged in the
16 Amended Complaint will be deemed to be waived.) The Clerk of Court is directed to terminate
17 this Defendant from the Court's docket.

IT IS FURTHER ORDERED that:

19 2. The Clerk shall issue a summons as to Plaintiff's First Amended Complaint [Doc.
20 No. 4] upon the remaining Defendants and shall forward it to Plaintiff along with a blank U.S.
21 Marshal Form 285 for each of these Defendants. In addition, the Clerk shall provide Plaintiff
22 with a certified copy of this Order, the Court's July 7, 2010 Order granting Plaintiff leave to
23 proceed IFP [Doc. No. 3], and certified copies of his First Amended Complaint and the
24 summons for purposes of serving each Defendant. Upon receipt of this "IFP Package," Plaintiff
25 is directed to complete the Form 285s as completely and accurately as possible, and to return
26 them to the United States Marshal according to the instructions provided by the Clerk in the
27 letter accompanying his IFP package. Thereafter, the U.S. Marshal shall serve a copy of the
28 First Amended Complaint and summons upon each Defendant as directed by Plaintiff on each

1 Form 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d);
 2 FED.R.CIV.P. 4(c)(3).

3 3. Defendants are thereafter **ORDERED** to reply to Plaintiff's First Amended
 4 Complaint within the time provided by the applicable provisions of Federal Rule of Civil
 5 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted
 6 to "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or
 7 other correctional facility under section 1983," once the Court has conducted its *sua sponte*
 8 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
 9 determination based on the face on the pleading alone that Plaintiff has a "reasonable
 10 opportunity to prevail on the merits," Defendants are required to respond).

11 4. Plaintiff shall serve upon Defendants or, if appearance has been entered by
 12 counsel, upon Defendants' counsel, a copy of every further pleading or other document
 13 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
 14 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
 15 of any document was served on Defendants, or counsel for Defendants, and the date of service.
 16 Any paper received by the Court which has not been filed with the Clerk or which fails to
 17 include a Certificate of Service will be disregarded.

18 **IT IS SO ORDERED.**

19 DATED: August 23, 2010

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 21 **WILLIAM Q. HAYES**
 22 United States District Judge